

Respondent argues that the claimant's appeal must be dismissed for lack of jurisdiction. In the alternative, respondent requests that the Board reverse the Order because temporary total disability benefits can only be awarded when the claimant is, on account of the injury, rendered completely and totally incapable of engaging in any type of substantial and gainful employment, and in this case claimant voluntarily retired from his job more than seven months ago. However, if TTD is awarded, respondent agrees that those benefits must be reduced by the amount of claimant's weekly retirement benefit.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes that the appeal of the preliminary hearing Order should be dismissed for lack of jurisdiction on the issues of whether TTD can be awarded for a claimant who voluntarily retires and on the issue of whether a social security retirement benefit offset can be applied to TTD payments. However, the Order is modified to award claimant a minimum weekly benefit of \$25.00.

Claimant began working for respondent in 1993. Over the years he worked in refrigeration maintenance, plumbing, the cafeteria, and finally on the production break crew. Over the years, claimant began having problems with his right shoulder and wrist. This matter went to preliminary hearing on three occasions, January 11, 2011, August 3, 2011 and November 2, 2011. Claimant has undergone surgeries at the wrist and shoulder levels.

Claimant filed a K-WC E-1 Application For Hearing on August 9, 2011, alleging a date of accident beginning on June 10, 2010, and continuing through the present. Claimant retired from respondent at the age of 62, effective March 25, 2011. Claimant testified that he had planned to continue working until he was 65, but his physical problems prohibited his continuing to work with respondent.

At the last preliminary hearing, claimant requested TTD, which was granted by the ALJ effective September 9, 2011, based upon a stipulated average weekly wage of \$319.48. The Order does not state the reason for a weekly benefit of only \$4.15, but respondent did argue entitlement to an offset of claimant's \$905.00 monthly social security retirement benefit. This would calculate to \$208.85 per week on a 52 week year. Thus, the weekly benefit award of \$4.15.

PRINCIPLES OF LAW AND ANALYSIS

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only those issues listed in K.S.A. 44-534a(a)(2). Those are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.¹ The Board can also review those decisions when a party alleges the ALJ exceeded his jurisdiction.²

¹ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

² K.S.A. 2008 Supp. 44-551(i)(2)(A).

The issue of whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.³

The ALJ has the jurisdiction and authority to grant or deny temporary total disability benefits at a preliminary hearing. Although he may have made a decision that respondent believes was wrong, that decision was his alone to make at this juncture of the claim. Accordingly, the ALJ did not exceed his jurisdiction in awarding TTD benefits and the Board does not have jurisdiction to address this issue at this point in the proceedings.

K.S.A. 44-501(h) states:

(h) If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

This Board Member must next determine whether the ALJ exceeded his jurisdiction in allowing an offset of claimant's social security retirement benefits against the awarded TTD. The statute limits the offset to be no less than the workers compensation benefit payable for the employee's percentage of functional impairment. Claimant argues that K.S.A. 44-501(h) was never intended by the legislature to apply to TTD. In support of his position, claimant cites *Robinson*.⁴ Claimant is correct that the Board, in *Robinson*, did not apply the offset against TTD benefits. However, a review of *Robinson* shows that an offset against TTD benefits was not an issue addressed by the Board or the Court of Appeals. The issue in *Robinson* addressed the method of calculating the weekly amount of the offset when considering the amount of the lump sum benefit received by *Robinson*.

³ *Allen v. Craig*, 1 Kan. App. 2d 301, 303 and 304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

⁴ *Robinson v Southwestern Bell Telephone, Co.*, 39 Kan. App. 2d 342, 180 P.3d 597 (2008).

The Board addressed the specific issue of an offset against TTD benefits in *Tucker*.⁵ The Board in *Tucker* differentiated between functional impairment and TTD for the purposes of applying a social security retirement offset. The Board found proper the use of the offset against TTD payments. Therefore, the ALJ did not exceed his jurisdiction in applying the offset against the TTD benefits.

K.S.A. 44-510c(b)(1) states:

(b) (1) Where temporary total disability results from the injury, no compensation shall be paid during the first week of disability, except that provided in K.S.A. 44-510h and 44-510i and amendments thereto, unless the temporary total disability exists for three consecutive weeks, in which case compensation shall be paid for the first week of such disability. Thereafter weekly payments shall be made during such temporary total disability, in a sum equal to 662.3% of the average gross weekly wage of the injured employee, computed as provided in K.S.A. 44-511 and amendments thereto, but in no case less than \$25 per week nor more than the dollar amount nearest to 75% of the state average weekly wage, determined as provided in K.S.A. 44-511 and amendments thereto, per week.

An ALJ has the jurisdiction to hear and decide a matter based upon the applicable facts and law. Jurisdiction, however, does not allow a statute to be ignored or violated. Here, claimant's TTD minimum is \$25.00 per week. The award of TTD at \$4.15 per week violates a clear legislative mandate. The Order will be modified to award a minimum of \$25.00 per week in TTD benefits.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The undersigned Board Member concludes that the appeal of the preliminary hearing Order should be dismissed for lack of jurisdiction on the issues of whether TTD can be awarded for a claimant who voluntarily retires and affirmed on the issue of whether a social security retirement benefit offset can be applied to TTD payments. However, the Order is modified to award claimant a minimum weekly benefit of \$25.00.

⁵ *Tucker v. Raytheon Aircraft Company*, No. 1,020,966, 2005 WL 3030758 (WCAB Oct. 28, 2005).

⁶ K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the claimant's appeal of the Order of Administrative Law Judge Bruce E. Moore dated November 2, 2011, is modified to award claimant the minimum weekly benefit of \$25.00, but in all other regards the Order remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of January, 2012.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
Mickey W. Mosier, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge